

Citation: 2003TCC730
Date: 20031009
Dossier : 2000-1798(IT)I

BETWEEN:

ELWIRA SOKOLOWSKI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

(These Reasons for Judgment are issued in substitution for the Reasons for Judgment signed on January 22, 2002)

Lamarre, J.

[1] These are appeals under the informal procedure against assessments made by the Minister of National Revenue ("Minister") under the *Income Tax Act* ("Act") for the 1995, 1996, 1997, 1998 and 1999 taxation years.

[2] In filing her 1995 income tax return, the appellant claimed a business investment loss of \$268,897 with respect to investments in eight mortgages held "in trust" for the appellant and her father Henry Sokolowski by Kiminco Acceptance Co. Ltd. ("Kiminco"), a member of the Glen Coulter group of companies. The eight mortgage investments were made in 1987 and 1988 and are identified as follows in paragraph 13 of the Reply to the Notice of Appeal:

Account/Mortgage Number	Ultimate Borrower	Gross Amount of the Investment
6658	Mid-Canada Construction Ltd.	\$300,000
7492	Janre Estate Development Corp.	\$120,000
7425	Armour	\$ 19,000
7495	Re/Max Gateway Realty	\$ 23,000
7586	Nesrallah	\$ 53,000
8338	G. Capello	\$ 31,000
6464	Dumont	\$ 16,000
8111	Danilov, Frechette	\$ 20,000

[3] The losses claimed result from Kiminco's bankruptcy on July 17, 1989.

[4] By Notice of Reassessment dated May 6, 1999, the deduction for business investment losses from the appellant's Kiminco investments was reduced by the Minister from the \$268,897 claimed by the appellant to \$13,072 for the 1995 taxation year. This was done for the reasons set out hereunder.

[5] With respect to the Mid-Canada Construction Ltd. mortgage investment, the firm Peat Marwick Thorne Inc. ("Peat Marwick"), the receiver in bankruptcy appointed for Kiminco, recovered in 1989 \$16,143 of the original \$300,000 invested so that the loss appeared as \$283,856. In the same year, 1989, the appellant claimed that loss and the Minister allowed 2/3 of \$283,856 (= \$189,237) as a capital loss. The appellant was at that time allowed 50 per cent of that capital loss as an allowable business investment loss ("ABIL"). The appellant's 50 per cent share of that capital loss was \$94,619. The other 50 per cent was allocated to the appellant's father on the basis that Henry Sokolowski and Elwira Sokolowska jointly invested in the mortgage in question through Kiminco, as per the documentation provided at that time by the appellant.

[6] With respect to the Janre Estate Development Corp. mortgage investment, Peat Marwick, again acting as receiver, had — also in 1989 — recovered \$6,457 of the amount of \$120,000 originally invested, so that the loss appeared as \$113,542. The Minister allowed 2/3 of \$113,542 (= \$75,695) as a capital loss in 1989. The appellant was allowed 50 per cent of that loss (\$37,847) as an ABIL in that same year. The other 50 per cent was allowed to Henry Sokolowski, as per the documentation provided at that time by the appellant and her father.

[7] As the losses with respect to those two mortgage investments (Mid-Canada Construction and Janre Estate Development Corp.) had already been allowed to the appellant and to Henry Sokolowski in 1989, no amount was allowed by the Minister with respect to those losses in 1995.

[8] No other loss was allowed in 1989 with respect to the other six mortgage investments because no information in that regard was provided at the time by the appellant. However, based on additional documentation provided by the appellant, the appellant was allowed a business investment loss of \$13,072 for 1995 on those six other mortgage investments, as follows (see paragraph 33 of the Reply to the Notice of Appeal):

Mortgage	Investment	Recovered by Peat	Net Loss	Allowed to Henry Sokolowski	Allowed to the Appellant
7425 Armour	\$19,000	\$16,429	\$ 2,571	\$1,285	\$ 1,285
7495 Re/Max	\$23,000	\$21,636	\$ 1,364	\$ 682	\$ 682
7586 Nesrallah	\$53,000	\$46,137	\$ 6,863	\$3,431	\$ 3,431
8338 Capello	\$31,000	\$25,768	\$ 5,232	\$2,616	\$ 2,616
6464 Dumont	\$16,000	\$14,253	\$ 1,747	\$ 0	\$ 1,747
8111 Danilov/ Frechette	\$20,000	\$16,689	\$ 3,311	\$ 0	\$ 3,311
Totals			\$21,087	\$8,014	\$13,072

[9] As shown in the above chart and in the "Analysis of Allowable Business Investment Losses" prepared by Tiffany Golding, an appeals officer at the Canada Customs and Revenue Agency ("Agency") (Exhibit R-1, Tab 1), 100 per cent of the loss on the "6464 Dumont" and "8111 Danilov, Frechette" investments was allocated to the appellant for 1995, as these investments were made in the appellant's name alone (Exhibit R-1, Tabs 14 and 15). The loss on the other investments was allocated 50 per cent to the appellant and 50 per cent to Henry Sokolowski for 1995, as the mortgage investment documents show that they were made in the names of both Elwira Sokolowska and Henry Sokolowski (see Exhibit R-1, Tabs 10 to 13 inclusive). The total capital loss allowed to the appellant as an ABIL for 1995 amounted to \$13,072.

[10] Half of the taxable capital gains resulting from recoveries made by the receiver, Peat Marwick, with respect to the Mid-Canada Construction Ltd. mortgage and the Janre Estate Development Corp. mortgage in 1995 were also allocated to the appellant. That allocation between the appellant and her father was in the same proportion as for similar taxable capital gains for the years 1990, 1991 and 1992 (as shown in paragraph 22 of the Reply to the Notice of Appeal).

[11] Indeed, in a judgment rendered by Judge Bonner of this Court on April 16, 1997, (*Sokolowska v. Canada*, [1997] T.C.J. No. 321 (Q.L.)) with respect to the appellant's 1990, 1991 and 1992 taxation years, it was decided that the appellant's interest in the two mortgage investments referred to in the preceding paragraph was 50 per cent, with the other 50 per cent of the beneficial ownership of those mortgage investments belonging to Henry Sokolowski.

[12] In addition to the assessment for the appellant's 1995 taxation year, the Minister issued Notices of Reassessment dated May 6, 1999, disallowing non-capital losses that were carried forward from previous years and that were applied in the amounts of \$11,215 to the 1996 taxation year, \$12,701 to the 1997 taxation year and \$24,586 to the 1998 taxation year.

[13] By letter dated February 19, 2001, counsel for the respondent advised the appellant and the Court that the Minister would consent to a judgment allowing the carry-forward to the 1996, 1997 and 1998 taxation years of those same amounts of ABILs, namely: \$11,215 for the 1996 taxation year, \$12,701 for the 1997 taxation year and \$24,586 for the 1998 taxation year.

[14] The issue with respect to the 1999 taxation year also concerns the quantum of ABILs available for application to that year. It is the Minister's position that the

unapplied balance of ABILs, if any, available to the appellant from the losses on her Kiminco investments reverted to "net capital loss" prior to her 1999 taxation year.

[15] I understand from the appellant's mother, Maria Sokolowska, who was the only one to testify at the hearing, that the sole issue is that she does not accept the 50 per cent share of ABILs allocated to her daughter, the appellant, with respect to the Janre Estate Development Corp. mortgage (see Exhibit R-1, Tab 7 and Exhibit A-1). Although she argued before Judge Bonner, who heard the appeals filed by the appellant for her 1990, 1991 and 1992 taxation years, that Henry Sokolowski was the sole beneficial owner of that mortgage investment, she now submits that the appellant was the sole beneficial owner thereof and that she should be allowed 100 per cent of the loss on the Janre Estate Development Corp. mortgage for the 1995 and following taxation years.

[16] However, this new submission is in contradiction with the document dated June 30, 1992, provided by the appellant to the Agency (Exhibit R-1, Tab 3), which shows a joint investment in the names of Elwira Sokolowska and Henry Sokolowski in the Janre Estate Development Corp. mortgage. Furthermore, the document from the receiver, Peat Marwick, also shows a joint investment by the appellant and her father in the Janre Estate Development Corp. mortgage (Exhibit R-1, Tab 6). The appellant has not brought to my attention any document showing that she was the sole beneficial owner of that mortgage investment.

[17] Furthermore, I agree with counsel for the respondent that there is issue estoppel on the matter of the respective shares of beneficial ownership attributable to Henry Sokolowski and Elwira Sokolowska with respect to the two major mortgage investments made in 1989 (Mid-Canada Construction Ltd. and Janre Estate Development Corp.). This very question has already been adjudicated in the decision of Judge Bonner of this Court. It was dealt with there for the purpose of determining the respective shares of the carrying charges and capital gain relating to the very same 1989 investments to be allocated for the 1990, 1991 and 1992 taxation years. Judge Bonner determined that the appellant had a 50 per cent share of the beneficial ownership of those mortgage investments. The appellant now wants to carry over to 1995 (and subsequent years) 100 per cent of the loss on the mortgage investments in respect of which Judge Bonner determined that she had only a 50 per cent interest. That issue is in my view *res judicata* between the parties (see *Wierbicki v. The Queen*, 2000 DTC 6243 (F.C.A.)) and the appellant is not in a position to claim more than 50 per cent of the loss carry-over with respect to the Janre Estate Development Corp. mortgage investment for the 1995 and

subsequent taxation years. Furthermore, the unapplied balance of ABILs available to the appellant from the losses on her Kiminco investments incurred in 1989 (which amounted to \$74,774 on December 31, 1996 as per Exhibit R-1, Tab 2) reverted to "**net-capital losses**" after December 31, 1996. Therefore, no allowable business investment loss is available to the appellant from the losses on her Kiminco investments after 1996. Those losses were converted as of that date to the net capital loss balance and thus became deductible only against capital gains (see paragraphs 111(1)(a) and (b) and subsection 111(8) of the *Act* which is reproduced in part below):

SECTION 111: Losses deductible.

(1) For the purpose of computing the taxable income of a taxpayer for a taxation year, there may be deducted such portion as the taxpayer may claim of the taxpayer's

▶ **111(1)(a)** ◀

(a) **Non-capital losses** – non-capital losses for the 7 taxation years immediately preceding and the 3 taxation years immediately following the year;

▶ **111(1)(b)** ◀

(b) **Net capital losses** – net capital losses for taxation years preceding and the three taxation years immediately following the year;

▶ **111(8)** ◀

(8) **Definitions.** In this section,

"*net capital loss*" – "net capital loss" of a taxpayer for a taxation year means the amount determined by the formula

$$A - B + C - D$$

where

A is the amount, if any, determined under subparagraph 3(b)(ii) in respect of the taxpayer for the year,

B is the lesser of the total determined under subparagraph 3(b)(i) in respect of the taxpayer for the year and the amount determined for A in respect of the taxpayer for the year,

C is the least of

(a) the amount of the allowable business investment losses of the taxpayer for the taxpayer's seventh preceding taxation year,

(b) the amount, if any, by which the amount of the non-capital loss of the taxpayer for the taxpayer's seventh preceding taxation year exceeds the total of all amounts in respect of that non-capital loss deducted in computing the taxpayer's taxable income or claimed by the taxpayer under paragraph 186(1)(c) or (d) for the year or for any preceding taxation year, and . . .

"*non-capital loss*" – "non-capital loss" of a taxpayer for a taxation year means the amount determined by the formula

$$(A + B) - (D + D.1 + D.2)$$

where

A is the amount determined by the formula

$$E - F$$

where

E is the total of all amounts each of which is the taxpayer's loss for the year from an office, employment, business or property, the taxpayer's allowable business investment loss for the year, an amount deducted under paragraph (1)(b) or section 110.6 in computing the taxpayer's taxable income for the year or an amount that may be deducted under paragraph 110(1)(d), (d.1), (d.2), (d.3), (f), (j) or (k), section 112 or subsection 113(1) or 138(6) in computing the taxpayer's taxable income for the year

F is the amount determined under paragraph 3(c) in respect of the taxpayer for the year.

[18] Finally, I understand from the respondent's submissions and from paragraphs 47 and 49 of the Reply to the Notice of Appeal that the respondent acknowledges that the appellant had sufficient unexpired ABILs available to permit her to claim the amounts of \$11,215 for 1996, \$12,701 for 1997 and \$24,586 for 1998. I understand that the appellant had no ABILs available for application to her 1999 taxation year. While no explanations were given at the hearing regarding these additional amounts of ABILs allowed, it is my understanding that allowing them was not done to the detriment of the appellant but to her benefit. It is my belief that the appellant does not dispute this.

[19] Consequently, the appeals with respect to the 1995 and 1999 taxation years are dismissed and the appeals with respect to the 1996, 1997 and 1998 taxation

years are allowed and the assessments are referred back to the Minister for reconsideration and reassessment on the basis that the appellant may carry forward allowable business investment losses from previous years in the amounts of \$11,215, \$12,701 and \$24,586 for the 1996, 1997 and 1998 taxation years respectively.

Signed at Ottawa, Canada, this 9th day of October 2003.

Lamarre, J..

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REASONS FOR JUDGMENT BY: The Honourable Judge Lucie Lamarre

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APPEARANCES:

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